89-1178

No.: _____

IN THE

Supreme Court of the United States

October Term, 1989

FILIPPO CASAMENTO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Was the Petitioner deprived of a fair trial, in violation of Rule 14 of the Federal Rules of Criminal Procedure and the guarantee of due process of law of the Fifth Amendment of the United States Constitution, where, in the face of the massive and continuing prejudicial publicity, prosecutorial overreaching and atmosphere of violence which attended and infected his trial, he was forced, despite his timely and repeatedly renewed motions for severance, based on entirely circumstancial and utterly flimsy evidence against him, to stand trial together with 20 other co-defendants for 17 months under a wide-ranging, 35-defendant, 16-count RICO-narcotics indictment charging, inter alia, a nine-year international conspiracy to import and distribute heroin, and where at that trial the evidence against Petitioner, comprising but 673 pages out

of a 42,000-page trial record, took but four days to present, that evidence was presented eight months before the jury commenced its deliberations, and, due to the number of defendants on trial and the mass of evidence introduced at this mega-trial, a month passed between the summation argument of Petitioner's counsel and the commencement of the jury's deliberations?

PARTIES IN THE UNITED STATES COURT OF APPEALS

The parties to the proceeding in the United States Court of Appeals for the Second Circuit were Petitioner, Filippo Casamento, as Appellant, and Respondent, United States of America, as Appellee[1].

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[1] The other appellants before the Court of Appeals were: Emanuele Palazzolo, Giovanni Cangialosi, Salvatore Salamone, Giovanni Ligammari, Giuseppi Lamberti, Frank Castronovo, Gaetano Badalamenti, Salvatore Catalano, Salvatore Mazzurco, Salvatore Lamberti, Giuseppe Trupiano, Giuseppe Vitale, Lorenzo Devardo, Salvatore Greco and Francesco Polizzi.

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Petitioner Filippo Casamento respectfully requests that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Second Circuit entered herein on October 11, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 887 F.2d 1141 (2d Cir. 1989). It is reproduced in the Appendix

to this Petition. The pre-trial memorandum and order of the District Court denying petitioner's and other defendants' motions for severance, which is not officially reported, is reproduced in the Appendix to the Petition.

JURISDICTION

By order dated November 21, 1989, the Court of Appeals denied Petitioner's timely motion for rehearing. A copy of that order appears in the Appendix. This petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

RELEVANT RULES OF CRIMINAL PROCEDURE

Federal Rules of Criminal Procedure, Rule 2:—

> These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

Federal Rules of Criminal Procedure, Rule 14:

> If it appears that a defendant...is prejudiced by a joinder of offenses, or of defendants in an indictment...the court may...grant a severance of defendants or provide whatever other relief justice requires....

STATEMENT OF THE CASE

On February 19, 1985, there was filed in the Southern District of New York a 16-count superseding indictment naming as defendants 35 individuals and charging all of the defendants with participation in a nine-year international conspiracy to import and distribute heroin in violation of 21 U.S.C. Section 846 (Count 1). Count 16, the only other count naming Petitioner as a defendant, charged 31 of the defendants with conspiring to conduct and participating, through a pattern of racketeering, in an enterprise which engaged in drug trafficking and money

laundering related thereto, or aiding and abetting therein, in violation of 18 U.S.C. Sections 1962(d) and 2.

Beginning on September 30, 1985, Petitioner was tried together with 20 co-defendants on this indictment. His trial lasted more than 17 months, concluding on March 2, 1987, when the jury, following 36 hours of deliberations over six days, returned with its verdicts, which included findings that Petitioner was guilty on both counts on which he was charged.

Although there were originally 21 defendants at Petitioner's trial, by the time of verdict there remained but 19 defendants. Defendant Gaetano Mazzara was murdered and his body discovered in Brooklyn on December 2, 1986, more than a year into trial. Defendant Pietro Alfano was shot and wounded and a mistrial declared as to him during the summation stage of the trial, in February 1987. In

addition to the atmosphere of violence engendered by Mazzara's murder and the shooting of Alfano, as the Court of Appeals' opinion indicates, prior to and throughout this trial there was an atmosphere of violence and adverse, highly prejudicial publicity hanging over the entire proceeding, e.g., the prosecutor's improper reference to the Galante murder in his opening; the December 16, 1985 murder of Paul Castellano, listed as an unindicted co-conspirator, who was named on a government chart as head of the La Cosa Nostra "Commission"; the open display and demonstration of 59 guns, including automatic weapons, before the jury.

At the conclusion of trial, only one of the remaining 18 defendants, Vito Badalamenti, who was charged only on Count 1 and who is the son of co-defendant Gaetano Badalamenti, was acquitted. All other defendants were convicted on at

least certain counts, including Giuseppe Trupiano, who was charged and convicted on Counts 1 and 16, but as to whom the Court of Appeals determined there was insufficient evidence to convict (51a-53a). The verdict sheet given to the jury was 63 pages. It required 508 separate verdicts, 73 regarding the defendants' guilt and 435 special verdicts.

The transcript of trial is more than 42,000 pages long. There were more than 275 witnesses and thousands of exhibits, including tape transcripts (over 1500 pages), depositions (over 500 pages), bank records (six cartons) and the 59 guns.

The proof included evidence of murders, Mafia genealogy and organization, the transport of $50 million in boxes and suitcases to Switzerland and Italy for purchases of heroin, and literally scores of other extraordinary criminal transactions, none of which involved

Petitioner. Thus, for example, three months of trial were devoted to evidence concerning the 1980 investigation and seizure of 40 kilograms of heroin in Milan, Italy; one month to sales by co-defendant Guiseppi Ganci (who was severed on the Government's motion prior to trial and died shortly after this trial began) to co-defendant Benito Zito (another severed defendant) and an undercover agent of $615,000 worth of heroin. Another month was devoted to evidence of heroin sales to police officers from the Aiello Pizzeria in Brooklyn and the seizure of $385,000 from the home of alleged co-conspirator Rosario Dispenza; another month was devoted to the 1980-82 shipments of $50 million to Switzerland and Italy.

Again, Petitioner was not in any manner shown to be involved in any of these transactions, the proof of which consumed the vast bulk of this 17-month mega-trial.

The proof against Petitioner takes up but 673 pages out of this 42,000 page transcript and took but four trial days (May 27, 28, 29 and 30, 1986) out of the 17-month trial. That proof was received eight months before the jury began its deliberations. It was limited to a period in mid-1983 when Petitioner was observed meeting on twelve occasions with Ganci and was overheard conversing with him during wiretapped phone conversations.

As summarized by the Court of Appeals, this evidence consisted of the following:

(a) During this six-month period, Petitioner communicated with Ganci, whom the Government's evidence showed had sold

heroin to defendant Benito Zito, "through brief, apparently coded messages using the same phrases Ganci used in other drug-related conversations" (36a).

(b) During this same six-month period, Petitioner was observed by surveillance agents "meeting with Ganci several times -- in Ganci's car, in a park, in a store -- for meetings which lasted up to twenty minutes." (id.)

In addition, apparently of the view that this was the most incriminating evidence against Petitioner, the Court of Appeals purported to summarize the evidence concerning an August 6 and 7, 1983 transaction between petitioner and Ganci as follows (37a):

> On August 6, 1983, Casamento called Ganci at home in Queens, New York, and asked him if they could meet the next day for five minutes. Ganci replied that "[i]f you need, even now." Casamento said he did not want to meet just then and they arranged to meet the next day. The next morning, Ganci was

observed meeting Casamento at a store in Brooklyn, New York. After about twenty minutes in the store, Ganci and Casamento left, carrying boxes. They put the boxes in Ganci's car. Ganci then drove away alone.

Shortly after noon, Ganci called Mazzurco, his associate in narcotics dealing...and told him that he needed "three of those checks." Later that afternoon, Mazzurco met Ganci and handed him a bag. After receiving the bag from Mazzurco, Ganci was observed driving home with it and carrying it into his house.

That night, shortly after ten o'clock, Casamento called Ganci's home and told Ganci's wife that he was coming over. A few minutes after eleven o'clock, Casamento arrived at Ganci's house. Casamento was observed looking around in every direction as he walked from his car to Ganci's house. Less than four minutes after entering Ganci's house, Casamento left. After leaving Ganci's house, according to the testimony of an agent who followed him, Casamento appeared to detect that he was being followed and began to drive in an evasive manner.

"This series of events," the Court of Appeals held, "allows the reasonable inference to be drawn that Casamento purchased narcotics from Ganci, a dealer in narcotics" (37a). However, it is notable that the Court's strongest characterization of the Government's proof as to Petitioner's "dealings" with Ganci was that these were of a "suspicious nature" (36a). There was, plainly, no "overwhelming" evidence -- indeed, there was no hard evidence -- of Petitioner's complicity in any crime. There was no narcotics observed by the agents. Nor was any money observed in the boxes which were carried from the store, which was an Italian grocery store owned and operated by petitioner, on that Sunday morning; indeed, one of the boxes, which was open, contained groceries, and the agents were unable to observe the contents of the other two boxes since they were closed.

In contrast to this so thin evidence against Petitioner and the other peripheral defendants, e.g., Trupiano, the evidence against other of the defendants, including Ganci, who was severed before trial, and the evidence against unindicted co-conspirators and as to these massive charged conspiracies was overwhelming. These peripheral defendants were small fish caught up in a flood of evidence concerning Mafia wrongdoing and international narcotics dealings having nothing at all to do with these minor defendants.

Based on his conviction on Count 1, Petitioner was sentenced to 30 years in prison and fined $50,000. On Count 16 he was sentenced to a concurrent term of 20 years in prison and fined an additional $25,000. He was also ordered to pay

$200,000 as restitution to the Government, but that order was reversed by the Court of Appeals (74a-79a).

Both before and during this trial, Petitioner and co-defendants moved for severances. All such motions were denied.

THE COURT OF APPEALS' DETERMINATION ON THE QUESTION OF SEVERANCE

Although the Court of Appeals described this as a "principal issue" raised on the defendants' appeals (9a) and stated that it had "misgivings about trials of this magnitude" (15a), and, indeed, went so far as to set out "benchmarks" to guide the exercise of discretion of the district courts in future cases (1a-17a) -- "in the hope that we will not soon again be presented with the transcript of a seventeen-month trial in which more than thirty persons were named as defendants" (18a), the court ultimately concluded that the various appellants "did not suffer a deprivation

of their rights to due process as a result of the length and complexity of [this] trial, or due to any spillover prejudice which they may have suffered, or due to the publicity and the alleged atmosphere of violence which surrounded the trial" (25a).

In so ruling, the court below, while noting that there were several appellants "whose alleged roles in the conspiracy were comparatively minor" (18a), stated that it did "not believe that any prejudicial spillover suffered by any appellant was sufficiency substantial to warrant reversal based on the denial of the severance motions" (id.). Prior to this, the court had stated that a defendant seeking reversal based on a claimed abuse of discretion in denying severance had to meet an "extremely difficult burden" of establishing "substantial prejudice," since, "by and

large, joinder promotes judicial efficiency" (11a). In this connection, the court stated that "[a]lthough the jury had to evaluate a tremendous amount of evidence, the nature of the evidence and the legal concepts involved in the case were not extraordinarily difficult to comprehend, as they might be, for example, in a complex antitrust case involving abstruse economic theories or an employment discrimination case involving technical statistical evidence and formulae" (12a).

Also, the court indicated that the distinctions the jury drew among the defendants and the various counts suggested that it was "indeed able to evaluate the evidence critically and follow the instructions of the trial judge" (12a). Similarly, it was impressed by the "effort" and "interest" evidenced by the jury as evidenced by its requests

for the entire transcript, various items in evidence, and for a blackboard, chalk and eraser, as well as copies of the Government's "summary chart book" (which was not in evidence) (12a; see also 18a-19a).

Significantly, however, the court gave little apparent weight to the appellants' arguments that the length and complexity of this trial caused an undue burden on jurors and juror resentment (12a-15a). Likewise, it dismissed the peculiar problem of spillover prejudice to the peripheral defendants, including Petitioner, by noting that "much of the evidence the Government presented at the joint trial regarding the activities of alleged co-conspirators would have been admissible in the single-defendant trials" and that "the district judge instructed the jury to consider the evidence against each defendant separately" (18a). There

was in the court's opinion no discussion of how any single peripheral defendant might have been particularly prejudiced by this so prejudicial, highly publicized, lengthy and complex, violence infected trial. Nor, finally, was there any indication from the court's opinion that it was at all taken aback that, while the court held the evidence with respect to defendant Trupiano was insufficient to convict (see 51a-53a), in fact, on this patently insufficient evidence, the jury had found Trupiano guilty on Counts 1 and 16, the same two charges on which Petitioner was found guilty, also on the thinnest of evidence.

In like vein, it should be noted, the Court of Appeals appeared not to be concerned that, under the "benchmark" rules it was imposing in futuro on the district courts, which would require the Government to make "an especially

compelling justification for a joint trial of more than ten defendants [which is likely to require more than four months to present]" (17a), plainly Petitioner and the other peripheral defendants in this case would not have been required to undergo this type of mass trial. Nor, apparently, was the court at all embarrassed by the fact that, as it itself noted, one of the original co-defendants herein, Guiseppi Baldinucci, after he was severed on the Government's motion, was tried and convicted on narrower charges in but seven days (see 17a).

On November 21, 1989, the Court of Appeals denied Petitioner's timely petition for rehearing. There are presently pending before that Court similar petitions by other of the peripheral defendants tried together with Petitioner.

REASONS FOR GRANTING THE WRIT

1. PETITIONER WAS DEPRIVED OF DUE PROCESS BY BEING FORCED TO HAVE HIS GUILT OR INNOCENCE DETERMINED AT THIS SO LONG AND HIGHLY PREJUDICIAL MASS TRIAL.

In a variety of contexts the courts and commentators have noted that what constitutes the process due a party in order to satisfy the constitutional requirement of "due process of law" turns on careful analysis and balancing of competing interests, including procedural fairness and the reliability of the fact-finding process. Thus, for example, in the context of complex civil litigation, it has been urged by most respectable authorities that it may be beyond the capacity of civil juries to sit for long periods in cases involving complicated legal and factual issues. See, e.g., In re U.S. Financial Securities Litigation, 609 F.2d 411, 429 n.66 (9th Cir. 1979), cert. denied sub nom. Gant v. Union Bank, 446 U.S. 929 (1980), quoting remarks of

former Chief Justice Burger and the late Judge Jerome Frank. And, in the context of administrative decision-making, this Court has held that "the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any [such] process." Mathews v. Eldridge, 424 U.S. 319, 343 (1976). See also, Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 12 (1979).

These same concerns, of course, have been recognized as particularly important in the field of criminal procedure. See, e.g., Rule 2 of the Federal Rules of Criminal Procedure. And, in the specific context of joinder and severance under Rule 14, however broad the discretion afforded the district courts under Rule 14, see, e.g., United States v. Gallo, 668 F.Supp. 736, 748 (E.D.N.Y. 1987), aff'd

863 F.2d 185 (2d Cir. 1988), cert. denied 109 S.Ct. 1539 (1989), and whatever the weight to be accorded the presumption in favor of joinder, see id. at 748-49, citing and quoting from this Court's decision in Richardson v. Marsh, 481 U.S. 200 (1987), plainly, there has to be a point in terms of length and complexity of a criminal trial and the number of defendants tried together where it must be held that a mega-trial of the instant sort poses such a threat of a miscarriage of justice that it cannot be reconciled with either the right to trial by jury or due process. Cf. United States v. Gallo, 668 F.Supp. at 749, 753, 755; United States v. Kahaner, 203 F.Supp. 78, 81-82 (S.D.N.Y. 1962) (Weinfeld, J.), aff'd 317 F.2d 459 (2d Cir.), cert. denied, sub nom. Corallo v. United States, 375 U.S. 836 (1963). And, it is submitted, this trial far exceeded that point in terms of length and

complexity and demonstrated likelihood of erroneous determinations, at least as to the Petitioner and other similarly situated peripheral defendants.

Here, Petitioner and his jurors were forced to sit throughout this entire 17-month, 21 defendant mega-trial, where there was no likelihood that this jury could intelligently weigh, much less recall, the eight-month old evidence against Petitioner and properly determine whether he was guilty or innocent of the so serious charges against him -- not any more than this jury was able to determine whether the defendant Trupiano was guilty or innocent, but who nonetheless on patently insufficient evidence was found guilty of the same charges as Petitioner.

The very same arguments for affirmance of Petitioner's conviction that were here invoked by the Court of Appeals have long been known to be entirely hollow

and unpersuasive. See, e.g., Note, Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure, 74 Yale L.J. 553 (1965); 1 Wright, Federal Practice & Procedure, Criminal (2d ed. 1982), Section 227; see also United States v. Gallo, 668 F.Supp. at 748-58. Indeed, in Richardson, this Court itself as much as conceded that the presumption that juries are able to follow their instructions is in many instances nothing better than a fiction. See 481 U.S. at 211. Where, as is certainly the case here, there are present both clear elements of serious prejudice and the strongest reasons to doubt the accuracy and reliability of the jury's determination of a defendant's guilt, it is submitted that it cannot be held that the process afforded such a defendant satisfies due process.

That this is so rings out from the opinion of the Court of Appeals. This inescapable conclusion cannot be lost on any fair reader of that opinion. And that opinion, at least as it relates to the Petitioner and the other peripheral defendants, itself indicts any system of justice which, at one and the same time, can tolerate such unfairness yet claims to adhere to the principles that guilt or innocence is individual and that every criminal defendant is entitled to a fair, even only a reasonably fair, trial.

2. THIS CASE PRESENTS THIS COURT WITH THE OPPORTUNITY BOTH TO REASSERT ITS AUTHORITY TO PROMULGATE RULES FOR THE CONDUCT OF CRIMINAL PROCEEDINGS IN THE DISTRICT COURTS AND TO PROVIDE NEEDED GUIDANCE TO THE LOWER FEDERAL COURTS CONCERNING HOW RULE 14 SHOULD BE APPLIED IN THIS ERA OF RICO AND OTHER MEGA-INDICTMENTS AND PROPOSED MEGA-TRIALS.

In this case the Court of Appeals took it upon itself in effect to amend the Federal Rules relating to permissive

joinder insofar as they apply to the district courts and prosecutors in the Second Circuit. This it did by promulgating its "benchmarks" -- really rules -- to "guide" the district courts in the exercise of their discretion in passing on severance motions in multi-defendant cases where it will likely take more than four months to present the prosecution's case. The necessary effect of these "benchmark guides" will be, undoubtedly, to curtail the independent exercise of discretion on a case by case basis of the district courts pursuant to Rule 14 of the Federal Rules of Criminal Procedure.

Whether or not one agrees with the wisdom or fairness of what the Court of Appeals has here done, it is submitted that it is not its proper role to be amending the Federal Rules of Criminal Procedure. That, by statute, is this

Court's exclusive role. Further, it is submitted, there is no need for the Courts of Appeals to be taking on any such rule-making role. Rather, we submit, their proper role in cases such as this is solely to act as a reviewing court and, on a case by case basis, to review for abuse the district court's exercise of discretion.

At the same time, it must be acknowledged, as cases such as this case and the Gallo case demonstrate, given what the RICO statute has done to Rule 8 joinder, see, United States v. Gallo, 668 F.Supp. at 746-48, as well as what this Court has recently said favoring joint trials, see, Richardson v. Marsh, 481 U.S. 200 (1987), there is a critical need for this Court to provide guidance on these issues. However, this, we submit, does not in fact require any new rule to be promulgated or any existing rule to be

amended. Rather, the joinder problems presented by such massive cases could be fully and properly addressed if only the district courts were to be directed by this Court to determine severance motions in the forthright and realistic manner in which District Judge Jack Weinstein addressed this issue in the Gallo case, and if the courts of appeals were directed to cease supinely abdicating their reviewing roles in such cases. See, e.g., criticizing the performance of the courts of appeals in this area, 1 Wright, Federal Practice & Procedure, Criminal (2d ed. 1982), Section 227; see also, Note, Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure, 74 Yale L.J. 553 (1965).

Plainly, not only may prejudice to peripheral defendants be assumed in these sorts of mega-trials, but as Judge Weinstein convincingly pointed out in

Gallo and, as the instant case so amply demonstrated, such prejudice is real, it is pervasive, and it can and does fatally undermine such defendants' right to a fair trial. This case affords this Court the opportunity to make it clear to the lower courts that what occurred in this case, both at the trial and appellate levels, need not and should not have occurred, that this was a clear abuse of discretion which should not have been sanctioned by the Court of Appeals, and that what occurred in this case is not, in any way, consistent with the Federal Rules of Criminal Procedure, which, in Rule 2 of those very rules, proclaim that they were "intended to provide for the just determination of every criminal proceeding."

CONCLUSION

For the reasons set forth herein, this Court should grant the Writ of Certiorari to review the judgment and decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Dated: January 17, 1990